PENANG PORT COMMISSION A

v.

KANAWAGI SEPERUMANIAM

COURT OF APPEAL, PUTRAJAYA B
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO. W-02-252-1994]
27 FEBRUARY 2006 C

CIVIL PROCEDURE: *Judgments and orders - Amendment of order - Extracted order of Court of Appeal stating that consequential order made on 26 February 1997 - Whether consequential order made on another date - Whether extracted order wrong in respect of consequential order contained therein* D

This was an application by the respondent seeking an order that the extracted order of the Court of Appeal dated 26 February 1997 be amended by deleting the words "... dan selanjutnya diperintahkan bahawa taksiran gantirugi oleh Timbalan Pendaftar pada 24 Oktober 1994 diketepikan ..." contained therein. The crux of this application involved a consequential order made by the presiding judge of the Court of Appeal, setting aside the order of the deputy registrar of the High Court dated 24 October 1994. The only matter requiring determination was whether the consequential order was made on 26 February 1997. If no such order was made on 26 February 1997, then the extracted order was wrong in respect of the consequential order contained therein. E F

Held (allowing the application) G
Per Mokhtar Sidin JCA:

(1) When this matter came up for hearing, Abdul Malek Ahmad JCA (as he then was) had delivered the judgment of the court in respect of the appeal. Upon perusal of the judgment, it was H evident that the judgment was only in respect of the appeal heard on 26 February 1997. There was no mention of the consequential order or what had happened on 27 February 1997. For that reason, the judgment was the correct statement of events as on 26 February 1997 and, as such, the I consequential order was not made on 26 February 1997.

Turning to the affidavits, the respondent clearly stated that the consequential order was not made on 26 February 1997, but on 27 February 1997 despite objections by the respondent's counsel. The appellant in its affidavit affirmed that such consequential order was indeed made, but refused to confirm or deny the date it was made. Taking into consideration the judgment and the affidavits, the consequential order was indeed made and pronounced by the presiding judge on 27 February 1997 and not on 26 February 1997. Since the extracted order stated that the consequential order was made on 26 February 1997, it was obviously wrong and ought to be corrected and amended. The date could not be corrected because the appellant refused to do so despite letters from the respondent's solicitors. The only alternative was to accede to the application by the respondent, which was to delete the words: "... dan selanjutnya diperintahkan bahawa taksiran gantirugi oleh Timbalan Pendaftar pada 24 October 1994 diketepikan ...". With the amendment, the extracted order would be a reflection of the hearing of the Court of Appeal on 26 February 1997. The hearing on 27 February 1997 should not be taken into consideration and ought to be disregarded.

Bahasa Malaysia *translation of headnotes*

Ini adalah permohonan oleh responden untuk mendapatkan perintah bagi meminda perintah termeterai yang dikeluarkan oleh Mahkamah Rayuan bertarikh 26 Februari 1997, iaitu bagi menghapuskan ungkapan "... dan selanjutnya diperintahkan bahawa taksiran gantirugi oleh Timbalan Pendaftar pada 24 Oktober 1994 diketepikan ..." di dalamnya. Permohonan pada asasnya adalah berkaitan dengan suatu perintah berbangkit (consequential order) yang dibuat oleh hakim sidang Mahkamah Rayuan, mengenepikan perintah yang dibuat oleh Timbalan Pendaftar bertarikh 24 Oktober 1994. Satu-satunya persoalan yang perlu diputuskan adalah sama ada perintah berbangkit dibuat pada 26 Februari 1997. Jika tiada perintah sedemikian dibuat pada 26 Februari 1997, maka perintah termeterai adalah khilaf berhubung dengan perintah berbangkit di dalamnya.

Diputuskan (membenarkan permohonan)
Oleh Mokhtar Sidin HMR:

(1) Apabila perkara ini dibangkitkan untuk pendengaran, Abdul Malek Ahmad HMR (sepertimana beliau pada waktu itu) telah menyampaikan penghakiman mahkamah berkaitan dengan rayuan. Meneliti penghakiman tersebut, adalah jelas bahawa penghakiman adalah berhubung rayuan yang didengar pada 26 Februari 1997. Tiada sebarang rujukan dibuat pada mana-mana perintah berbangkit atau apa yang berlaku pada 27 Februari 1997. Mengenai afidavit, responden mengatakan dengan jelas bahawa perintah berbangkit tidak dibuat pada 26 Februari 1997, tetapi pada 27 Februari 1997 walaupun dibantah oleh peguam responden. Dalam afidavitnya perayu mengesahkan bahawa perintah berbangkit tersebut sememangnya dibuat, tetapi enggan mengesahkan atau menyangkal tarikh ianya dibuat. Mengambil kira penghakiman dan afidavit, perintah berbangkit telah dibuat dan diumumkan oleh hakim sidang pada 27 Februari 1997 dan bukannya 26 Februari 1997. Oleh kerana perintah termeterai menyatakan bahawa perintah berbangkit dibuat pada 26 Februari 1997, ianya jelas khilaf dan harus diperbetulkan dan dipinda. Tarikh tidak boleh diperbetulkan oleh kerana perayu enggan berbuat demikian walaupun berpucuk-pucuk surat mengenainya ditulis oleh peguamcara responden. Maka itu, alternatif yang ada adalah untuk akur kepada permohonan responden, iaitu dengan menghapuskan perkataan-perkataan: "... dan selanjutnya diperintahkan bahawa taksiran gantirugi oleh Timbalan Pendaftar pada 24 Oktober 1994 diketepikan ...". Dengan pindaan yang dibuat, perintah termeterai akan mencerminkan pendengaran Mahkamah Rayuan pada 26 Februari 1997. Pendengaran pada 27 Februari 1997 tidak harus diambil kira atau dipedulikan.

Legislation referred to:
Rules of the High Court 1980, O. 14

For the appellant - Shahul Hameed Amirudin; M/s Lim Huck Aik & Co
For the respondent - Raja Aziz Addruse (Chew Eng Keat with him); M/s Khana & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-22-208-87]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:

[1] This is an application by the respondent for the following orders:

(1) that the extracted Order of the Court of Appeal dated 26.2.97 be amended by deleting the words "... DAN SELANJUTNYA DIPERINTAHKAN bahawa taksiran gantirugi oleh Timbalan Pendaftar pada 24.10.94 diketepikan ..." contained therein;

(2) costs of this application be paid by the Appellant;

(3) such further and/or other relief that this Honourable Court deems fit to grant.

[2] In the affidavit-in-support of the application the respondent stated that on 14 May 1987 he filed a writ against the appellant. The respondent then filed an application for O. 14 summary judgment under the Rules of the High Court 1980 for the following prayers:

(1) for a declaration that the decision of the Appellant's Disciplinary Board in terminating my services by letter dated 7.5.1987 was *ultra vires* the Penang Port Commission Act and therefore null and void and invalid; (Prayer 1)

(2) for a declaration that I having obtained a pass at the Bahasa Malaysia subject at the Sijil Pelajaran Malaysia examination 1976 has satisfied the Appellant's condition stipulated in their letter dated 26th July, 1975 to be confirmed as a Traffic Supervisor in the PPC's services; (Prayer 2)

(3) for an order that damages sustained by me be assessed by the Deputy Registrar and be paid by the Defendant to me together with interest at 8% per annum till the date of realisation; (Prayer 3)

[3] On 18 July 1994, the learned judge who heard this application granted order in terms prayers 1 and 3. There was no appeal against that decision. The respondent then applied for the damages to be assessed. The learned judge heard the application by the respondent for prayer 2 on 20 October 1994 and allowed it. Being dissatisfied with the decision on prayer 2 the appellant appealed and the appeal was registered as W-02-252-94 (the first appeal). In the meantime, the deputy registrar of the High Court

assessed the damages as sustained by the respondent pursuant to prayer 3 and on 24 October 1994 awarded damages in the sum of RM2,274,151.42 and interest at 8% per annum from the date of judgment (24 October 1994) until the date of realisation. Being dissatisfied with the assessment awarded, the appellant appealed to the judge in chambers.

[4] In his affidavit, the respondent stated that there was no order for stay of execution against the damages assessed and the respondent levied execution of the assessed sum. The respondent obtained a garnishee order nisi on 23 November 1994 and was made absolute on 7 December 1994. The appellant then applied for a stay of execution of the garnishee order before the learned judge. On 19 December 1994, the learned judge dismissed the application for stay by the appellant. The appellant appealed against the decision of the learned judge dismissing the appellant's application for stay which was registered as W-03-16-96 (the second appeal). The appellant paid the garnished sum on the date their application for stay was refused. The respondent submitted that since the garnished sum had been paid, the second appeal is academic.

[5] Both appeals came up for hearing before the Court of Appeal on 26 February 1997. On that day, the appellant was represented by Y.M. Raja Aziz Addruse and the respondent was represented by Mr. R.R. Sethu. Normally, I would not like to refer to the judges by their names, but in the present case I felt it is necessary to do so. The Court of Appeal who heard the appeals were YA Dato' NH Chan, YA Dato' Siti Norma Yaakob and YA Dato' Abdul Malek Ahmad JJCA. YA Dato' NH Chan JCA was the presiding judge. On 26 February 1997, the first appeal was called, heard and disposed of. The second appeal was fixed for hearing on the next day. The next day, when the court was to hear the second appeal, the presiding judge instructed the deputy registrar to recall the first appeal. The presiding judge then informed the parties that he was making a consequential order in respect of the first appeal in that the order of the deputy registrar of the High Court given on 24 October 1994 was to be set aside. This prompted Mr. R.R. Sethu, the learned counsel for the respondent, to submit the following:

(1) that the court had no jurisdiction to recall this file suo motto for the court was *functus officio*;

A (2) that the court had no jurisdiction to make the order it intended to make as this would tantamount to varying the order made the previous day; and

(3) that the subject matter of the order given by the High Court Deputy Registrar on the assessment of damages was still
B pending before the Judge of the High Court on an appeal from the Deputy Registrar and had not reached the Court of Appeal for the Court of Appeal to interfere with that order.

C **[6]** According to the affidavit of the respondent, the counsel for the appellant did not reply or make any submission. After making the consequential order the presiding judge instructed the deputy registrar to call the second appeal. The presiding judge informed the parties that he would not be making any order in respect of
D the second appeal. The respondent, thinking that the presiding judge's consequential order was indeed the order of the court, filed an application to the Federal Court seeking leave to appeal against the consequential order made by the learned presiding judge. The solicitors for the appellant extracted the order and in
E that order it was stated that the order setting aside the High Court deputy registrar's award was made on 26 February 1997. The respondent pointed out that the order setting aside the award was not made on 26 February 1997 but the next day which was on 27 February 1997. Despite this, the solicitor for the
F appellant extracted the order.

[7] On 15 September 1997, the respondent applied to the Registrar of the Court of Appeal to set aside the extracted order. The appellant opposed the application. On 28 August 1998, the deputy registrar of the Court of Appeal heard the respondent's
G application and the decision was reserved.

[8] On 23 June 1998, the judgment in respect of the first appeal written by Abdul Malek Ahmad JCA (as he then was) was delivered as the judgment of the court. The judgment shows that
H the Court of Appeal heard the first appeal on 26 February 1997 and the decision was made on 26 February 1997. There was no mention in the judgment that the first appeal was recalled on 27 February 1997 and the purported consequential order made by the presiding judge on 27 February 1997.

I

[9] The respondent contended that the order of the Court of Appeal extracted by the appellant's solicitors had caused a lot of confusion and the order ought to be corrected to reflect the actual order of the court given on 26 February 1997 which is reflected in the judgment of Abdul Malek Ahmad JCA.

[10] In their affidavit-in-reply, the appellant stated that the application by the respondent is scandalous, frivolous and vexatious or it is otherwise an abuse of the process of the court as, *inter alia*, it does not state the particular provision or rule for which the court is being moved to hear the said application. The appellant conceded that what was stated in the respondent's affidavit was what transpired in the High Court, ie, the granting of prayers 1 and 3 on 18 July 1994 and the adjournment of the hearing of the application for prayer 2. The appellant also conceded that prayer 2 sought by the respondent was for a declaration that the respondent was a traffic supervisor with the appellant. Pursuant to the order given by the learned judge in respect of prayers 1 and 3, the deputy registrar then proceeded to assess the damages suffered by the respondent which began on 15 October 1994.

[11] On 20 October 1994, the learned judge heard the application by the respondent in respect of prayer 2 and allowed the application and also made the declaration. With this order the deputy registrar proceeded with the assessment for damages. On 24 October 1994, the deputy registrar awarded the sum of RM2,274,151.42 as damages to the respondent, ie, RM2 million for distress, anguish, anxiety, inconvenience, embarrassment and humiliation and the balance was for wrongful termination. In their affidavit, the appellant affirmed that they had appealed against the deputy registrar's award to the judge in chambers. The events leading to the hearing of this appeal as stated by the respondent were also affirmed by the appellant.

[12] On 18 November 1994, the appellant filed the appeal against the learned judge's decision in respect of prayer 2. This appeal came up for hearing before the Court of Appeal on 26 February 1997, as I have stated earlier in accordance with the affidavit of the respondent. The appellant also affirmed the coram and the name of the presiding judge. The appellant also did not dispute what happened on 26 February 1997.

[13] As can be seen from the chronology of events, there was no controversy whatsoever leading to the decision on 26 February 1997. Both sides affirmed the events that took place. It is necessary for me to state the events that took place in the affidavits of both the respondent and the appellant that took place until 26 February 1997 to show that the dispute between the parties was only in respect of what happened on 27 February 1997. In my view, this matter would not be in this court if the appellant conceded that the consequential order was made on 27 February 1997 after the presiding judge instructed the deputy registrar to recall the first appeal. Had the appellant given their concession that the consequential order was indeed given on 27 February 1997, then the respondent could have proceeded to get leave from the Federal Court to appeal against that consequential order.

[14] It is on the insistence of the appellant that the consequential order was made on 26 February 1997 and not on 27 February 1997, that the respondent made this application to correct the extracted order. Since the appellant took the stand that the consequential order was not made on 27 February 1997, I take it that the appellant conceded that if the order was not made on 27 February 1997, no such order had been made. To clarify this, in my view, would be to go back to the same coram that sat on 26 February 1997. Since the matter came up before us, we have to find out whether the consequential order was made on 26 February 1997 and if no such order was made on 26 February 1997, then the extracted order was wrong in respect of the consequential order contained therein. As I have stated earlier, the extracted order was made without the approval of the respondent, due to the discrepancy in respect of the actual date it was given.

[15] As can be seen, there were no notes of proceedings made available to us. We had to rely on the affidavits filed. Fortunately for us, when this matter came up for hearing, Abdul Malek Ahmad JCA (as he then was) had delivered the judgment of the court in respect of the appeal. Perusing the judgment, I find that the judgment was only in respect of the appeal heard on 26 February 1997. There was no mention of the consequential order or what happened on 27 February 1997. For that reason, I take it that the judgment is the correct statement of events as on 26 February 1997 and as such the consequential order was not made on 26 February 1997. Turning to the affidavits, the respondent clearly

stated that the consequential order was indeed not made on 26 February 1997, but it was made on 27 February 1997 despite objections by the respondent's counsel. The appellant in their affidavit affirmed that such consequential order was indeed made, but refused to confirm or deny the date it was made. Taking the judgment and the affidavits, I am of the view that the consequential order was indeed made and pronounced by the presiding judge. This was made on 27 February 1997 and not on 26 February 1997. Since the extracted order stated the consequential order was made on 26 February 1997, it is obviously wrong. The order should be corrected and amended. The date could not be corrected because the appellant refused to do so despite letters from the respondent's solicitors. The only alternative is to accede to the application by the respondent, that is to delete the words: ".... DAN SELANJUTNYA DIPERINTAHKAN bahawa taksiran gantirugi oleh Timbalan Penaftar pada 24 October 1994 diketepikan ...". With the amendment, the extracted order would be a reflection of the hearing of the Court of Appeal on 26 February 1997. The hearing on 27 February 1997 should not be taken into consideration and disregarded.

[16] For the above reasons, we allowed the application by the respondent with full costs fixed at RM500.

[17] My learned brother, Abdul Kadir Sulaiman JCA, has seen this judgment in the draft and expressed his agreement to the reasonings. My learned brother, Mohd Saari Yusoff JCA has retired and could not express his views on this judgment. Anyway, we had given our unanimous decision allowing the application on 30 April 2002.